SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

DAN MARX,
Appellant,

vs.

WM. M. EBNER, *et al*,
Appellees.

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF ALASKA.

BRIEF FOR APPELLANT.

STATEMENT OF FACTS.

On August 20th, 1889, the Takou Mining and Milling Company owned thirteen mining claims at Juneau, Alaska, and on that day mortgaged the same to Samuel Coulter for $98,405.91. Eight of said claims were subsequently sold to Sylvester Farrell. Coulter sold and assigned said mortgage to Willis Thorp, who attempted to foreclose the same by publication, and who afterwards delivered to the respondents, a deed which purported to convey all of said property to the respondents. Farrel and The Takou Mining and Milling Company conveyed all of said thirteen mining claims

to this appellant. The appellant commenced this suit to redeem from said mortgage, and directly attacks the foreclosure proceedings, and for the purpose of exposing its invalidity, a complete copy of the record is incorporated in appellant's bill of complaint. Respondents' demurrer to the bill was sustained, and the bill dismissed, whereupon the appellant brings this appeal. Therefore if said foreclosure proceedings operated to pass the title to said property, the decree should be affirmed, otherwise the decree should be reversed. Appellant claims that the foreclosure proceedings and the decree therein, are void, and the objections to said record will be presented here in the order they appear therein.

ARGUMENT.

Section 7 of the Act of May 14, 1884, establishing a civil government for Alaska, provides that the general laws of Oregon then in force, should be the laws for said district, and in the brief it will be assumed that the procedure provided by the Oregon statutes operated in Alaska. The foreclosure was by publication, and the defendants therein were not personally served with process, and never appeared in said suit.

I.

The act of May 14th, 1884, created and established

the District Court for the District of Alaska, and defined its jurisdiction. All the record of the foreclosure proceedings purports to be in "The District Court of the United States for the District of Alaska." That the District Court, is not a Court of the United States, is conclusively settled by the decisions of this Court.

McAllister vs. United States, 11 S. C. R., 949.

The Coquitlan vs. United States, 16 S. C. R., 1114.

Section 50, of the Oregon Statute provides that the actions shall be commenced by "filing a complaint" * * * * and Section 64 provides that the complaint shall contain the "name of the Court," and the appellant contends that the jurisdiction of the District Court for the District of Alaska is not invoked by the application addressed to the District Court of the United States for the District of Alaska.

Ward vs. Stingham, 1 Code Rep., 118.

Garretson vs. Hayes, 7 Iowa, 19.

Jordan vs. Brown, 71 Iowa, 421.

The fact that the Court has jurisdiction of a class of causes does not of itself authorize the Court to proceed to a decree in any given case, but the machinery of the law must be put in motion, and this is only done in the manner provided by statute, viz., by filing a complaint

stating "the name of the Court," and other essentials not necessary to be here enumerated.

The power and authority of the District Court was not invoked, or the exercise of its authority induced, by a plea to a United States Court. A pleading addressed to one Court, does not influence or start the machinery of any other Court.

"Before the power to hear and determine a cause "attaches the parties must be brought before the tri- "bunal by proper pleadings, according to the practice "and laws governing proceedings therein."

Jordan vs. Brown, 71 Iowa, 421.

Dunlap vs. Susterlin, 63 Texas, 38.

Sheldon vs. Newton, 3 Ohio St., 499.

Edmunston vs. Elmerston, 2 Ohio, 252.

United States vs. Arrendondo, 6 Pet., 709.

The Court, in the recent case of Stockton vs. Reynolds, 140 U. S., 264, has practically adopted the principle contended for here. In this case the Court held that the judgment must be consistent with, and responsive to the pleadings, and by way of illustration held that if the pleading warranted or prayed for one kind of judgment that the entry of an entirely different judgment and one

without the issues was void. And it seems to follow that it is as necessary to describe the Court as the cause of action.

Certainly a complaint filed in the Circuit Court of the United States, for the District of Oregon, but entitled in the Circuit Court of the United States for the District of California, would not sustain a judgment by default in the Oregon Court, in case where there was no personal service of process or appearance by defendants, but after defendants are personally before the Court, either by personal service or appearance, the Court, having full jurisdiction could make the proper amendment, could treat the erroneous and descriptive words as surplusage; but in a case like this the record must stand as it is made and published, and inasmuch as it fails to show affirmatively a strict compliance with the requirements of the statute, it is void.

Gulpin vs. Page, 18 Wal., 350.

II.

Section 54 of the Oregon Statute provides the manner in which personal service shall be made upon a defendant, and Section 53 declares that the sheriff shall return to the Court, whether personal service was made or the defendant not found, then Section 55 provides that "when service of the summons cannot be made as

"prescribed in the last preceding section, (Section 54), "and the defendant after due diligence cannot be found "within the state, and when that fact appears by affi- "davit the judge shall grant an order that the service "be made by publication of a summons."

Under this section and before publication can be ordered, it must appear that the defendant cannot be personally served, and also that he cannot after due diligence be found within the state, and that fact, viz., the fact constituting "due diligence" must appear by affidavit. The affidavit upon which the order and publication were made, states no fact whatever tending to show that the defendant Farrell could not with "due diligence" have been found within said district. It merely states that he is a resident of Portland, Oregon, and that is his postoffice address. This is a mere allegation of non-residence in Alaska, and a residence in Oregon. Under statutes like this the Courts hold with out any dissent, that an effort amounting to "due diligence" must be made to find the defendant, and that the facts constituting this due diligence must appear in the affidavit, and affirmatively in the record.

The Supreme Court of California, in Ricketson vs. Richardson, 26 Cal., 153, says that "An affidavit which "merely repeats the language or substance of the stat- "ute is not sufficient. * * * * The ultimate facts of the "statute must be proved by the affidavit, by showing

"the probatory facts upon which each ultimate fact "depends. These ultimate facts, are conclusions drawn "from the existence of other facts to disclose which is "the special office of the affidavit. To illustrate: It is "not sufficient to state generally that after due dili- "gence the defendant cannot be found within the state, "or that the plaintiff has a good cause of action against "him, or that he is a necessary party; but the facts con- "stituting due diligence, or the facts showing that he is "a necessary party should be stated. To hold that a "bald repetition of the statute is sufficient, is to strip "the Court or Judge to whom the application is made "of all judicial functions, and allow the party himself "to determine in his own way the existence of jurisdic- "tional facts—a practice too dangerous to the rights of "defendants to admit of judicial toleration. The ulti- "mate facts stated in the statute, are to be found, so to "speak, by the Court or Judge from the probatory "facts stated in the affidavit before the order for pub- "lication can be legally made."

In McCracken vs. Flanigan, 127 N.Y., 493, the Court says: "It is from an examination of this statute, pretty "evident, that some degree of diligence must be exer- "cised to find the party, and what is due diligence de- "pends upon circumstances surrounding each case, and "the simple averments in the affadavit, that the defen- "dant is a non-resident and cannot be found within the "state are not alone sufficient to support an order for "the service of a summons by publication. * * * * It "need no argument to show that the averment in the "affidavit that the defendant cannot be found in the "state does not tend to prove the exercise of due dili- "gence to find defendant, for the statute in question

"not only requires that it be stated in the affidavit that "the defendant cannot be found, but expressly requires "the averment that he cannot be found after due dili- "gence. Hence the statute forbids that due diligence "may be implied from the statement that the defendant "cannot be found within the state."

In Pike vs. Kennedy, 15 Oregon, 425-6, an affidavit for an order of publication was held sufficient which averred:

"That said defendants reside at Walla Walla, in the "Territory of Washington, which is their postoffice ad- "dress; * * * that personal service cannot be had upon "defendants or either of them, for the reason that said "defendants have departed from this state, and remain- "ed absent therefrom for more than six consecutive "weeks, and now reside at Walla Walla."

Concerning this affidavit the Court says:—

"As we have seen, non-residence is not of itself suffi- "cient to authorize the order of publication, because "that alone is not inconsistent with the idea that the "defendant may be in the state doing business, al- "though his residence is in another state, and hence "would not relieve the necessity or requirement of due "diligence. But the allegation of non-residence in con- "nection with the facts additionally alleged * * * would "be ground for claiming that due diligence would be "unavailing. The allegation of non-residence is spe- "cific and certain in the affidavit, 'the defendants reside at "Walla Walla, Washington Territory, and that is their "postoffice address,' but this is not enough, and the in-

"quiry now is, whether the further statement taken in "connection with the averment of non-residence, 'that "personal service cannot be made on the defendants for "the reason that they have departed from the state, and "have remained absent therefrom for more than six "consecutive weeks, and now reside at Walla Walla,' "show such a state of facts as renders it apparent that "no act of diligence would be of any avail to find them "in the state.

"It seems to me that these averments, taken to-"gether, are legal evidence tending to show at least not "only non-residence, but actual absence from the state, "at the time this affidavit was made."

The same doctrine is announced in—

McDonald vs. Cooper, 32 Fed., 748.

Palmer vs. McMaster, 33 Pac., 132.

Beach vs. Beach, 43 N. W., 702.

The return of the marshall shows that the summons was received by him December 22, 1893, and was returned January 2, 1894.

It thus appears that he had the summons in his hands eleven days only, and we submit that it was impossible that he could have made any search or inquiry about the defendants, except in the immediate vicinity of Juneau, for the place was isolated, and the only way of communicating with other points was by boats, only

two per month touching at that point during that month; it is therefore preposterous to pretend that any search or inquiry was made by the officers beyond the limits of Juneau.

The marshal could not during the whole year of 1894, have discovered whether the defendants could be found in Alaska, and further, according to the authorities cited here, the return of this officer is not a sufficicient showing of diligence upon which to base an order of publication.

It is not sufficient basis for an order of publication for an officer to merely return that he had made diligent search, or for the party making the affidavit to state that he had exercised due diligence to find the defendants. It is necessary for him to return and show what he did, what efforts were made to find and serve the defendants.

It is their province to state the facts, and not to decide whether they have been diligent, or whether their acts constitute "due diligence." Their duty is to state the probative facts, and when the question is presented the Court will decide the ultimate fact, if there is any legal evidence upon which the judicial mind can act.

All that is averred in the affidavit regarding the effort made to find and serve the defendant Farrell is:—

"That the defendant, Sylvester Farrell, is not a res-"ident of the district of Alaska, but resides in the city "of Portland, Oregon. * * * That the postoffice address "of the said Sylvester Farrell is Portland, Oregon, where "said Farrell resides. * * * That a summons was duly "issued out of this court to the United States Marshal "for the District of Alaska, with directions to said U. S. "Marshal to serve the same upon said defendants, and "the said U. S. Marshal has returned the same to the "clerk of this Court with his return endorsed thereon "to the effect that the said defendants or either of them "could not be found in his district.

"Personal service of said summons cannot be made "on the said defendant, and the plaintiff therefore de-"mands an order that service of the same be made by "publication."

There is here no averment that the defendant was not in Alaska at the date of the affidavit, or that he was actually present at any place outside said district, or that any diligence was exercised to locate him. It is merely an averment that "he resides in Portland, Ore." That might be true, yet he could be in Alaska on pleasure or business. The statement that the marshal could not find the defendant, and so returned to the Court, does not help the affidavit. The search and return by the marshal is directed under the prior section, and does not establish the due diligence required by Section 55, that when it appears that the marshal cannot find the defendants, and when it appears by the affi-

davit that defendants cannot after due diligence be found, then, and not till then, can the order be made.

III. 1 Pac Rep 833

The summons published required the defendants to appear in a Court that did not exist. In Smith vs. Ellendale Mill Co., 4 Oregon, 41, the Court says: "A "judgment for want of an answer can only be 'taken "when it appears that the defendant has been duly serv- "ed with a summons notifying him to appear and an- "swer in the Court where the judgment is sought to be "taken.' " This doctrine is approved in:—

Trullinger vs. Todd, 5 Oregon, 39.

Sullivan vs. Settlemeier, 74 U.S., 444.

If a summons is void because it requires a defendant to appear in a wrongly named Court, it must be void, if it notifies a defendant to appear in a Court that has no existence. The publication of this summons imposed no obligation to appear; and the defendants were not in default in consequence thereof.

IV.

This summons is also void because it does not state the date of the order of publication. This is a requirement of Section 55, and its non-observance is fatal to the jurisdiction of the Court; concerning this quesion

the jurisdiction of the Court; concerning this question the Supreme Court, in March, 1889, in O'Dell vs. Campbell, 9 Oregon, 304-5, employed this language:

"The next objection is that the summons published "does not contain the date of the order for service by "publication. Section 55 of the code of procedure pro- "vides, among other things, that the summons published "shall contain the name of the court, the title of the "cause, a succinct statement of the relief demanded, the "date of the order for service by publication, and the "time within which the defendant is required to answer "the complaint.

"The summons published in this case contains all of "the several matters except the date of the order for "service by publication. Where the statute prescribes "certain things, which the summons published shall con- "tain, they must be deemed essential and necessary and "the absence of any of them in the summons published "is not a compliance with its requirements, nor do we "think that this provision of the statute is merely direc- "tory as claimed, but mandatory; for if the summons "may omit the date of the order for service by publica- "tion and still be held sufficient, why not, with equal "reason the succinct statement of relief demanded, or "the name of the Court, and the title of the cause, or "any other matter which this provision requires the "summons shall contain? In the eye of the law, one is "as essential as the other, and none can be omitted with- "out vitiating the summons published. It seems to "us no one would claim that a summons which omitted "to state these matters required by the statutes could "be held valid. The summons is the process by which

"the Court acquires its jurisdiction over the person, "and certainly if there is any legal proceeding in which "a direct and literal complianace with the statute ought "to be exacted, it is in a proceeding of the character "under consideration; the summons published must "contain the date of the order, not some other date, be- "fore or after the order was made by the judge, but the "date of the order itself. The summons published does "not contain the date of the order for service by publi- "cation, and is not the summons which the law pre- "scribes. We think the objection well taken. It is "sufficient that the law has prescribed the several mat- "ters which the summons shall contain, and whether "deemed needful or not, we have no authority to disre- "gard its requirements."

This summons does not contain any date, much less the date of the order. The summons states "Order for publication made January 5th, 1894." The only reference to a date in the order is this statement. "Dated January —, 1894." The order therefore is not dated, but left blank, and the summons, while stating when the order was "made," does not pretend to give the date, and it could not, for the order contained no date.

The affidavit for the order was sworn to January 3rd, 1894. The order itself was filed January 5th, 1894. The date of the order could therefore be credited to January 3rd, 4th or 5th. Probably the order was signed by the judge when the affidavit was made, January 3rd, and thereafter all the papers were left with the clerk for

filing. But the law contemplates that the order should be dated as well as signed, otherwise the provision would not have been made, that the summons should "contain the date" of the order, and the statute is not satisfied by a statement that the order was "made" on a particular day, when the law required the date to be stated, one expression is not the equivalent of the other.

The statute does not provide that the summons shall specify when the order was "made" but when it was dated.

To make an order is one thing, and to date it is a very different thing; it requires a different act for each service.

V.

The paper designated a summons in the record purports to have been and was issued by the clerk of the court, and corresponds essentially with the subpœna issued by the clerk of a Federal Court. It runs in the name of the President of the United States, and is tested in the name of the Judge of the District Court, and is signed and dated by the Clerk of the Court, under his seal, and therefore is not a statutory summons.

It also has the name of the plaintiff's attorney written on the corner and by the Clerk.

The appellant in his bill alleged that the clerk issued and delivered this paper to the marshal, and it further alleged that it was never legally issued or served.

All this the demurrer admits, and it necessarily follows that if there was no valid summons or subpœna ever issued or served, that the decree is inoperative. But, independent of the admission made by the demurrer, it is certain that under the Oregon statutes the summons is issued by either the plaintiff or his attorney, and not by the clerk.

1 Oregon Code, Sec. 51.

White vs. Johnson, 27 Oregon, 267.

VI.

The summons requires the defendants to appear as follows:—"You are hereby commanded to be and ap-"pear in the above entitled Court, holden at Sitka, in "said district, and answer the complaint filed against "you in the above entitled action, within twenty days "from the date of the service of the summons upon you, to-wit:—

"Within twenty days from the 5th day of March, "1894, and if you fail so to appear and answer, for want "thereof the plaintiff will apply to the Court for the re-

"lief demanded in the said complaint," and was dated January 5th, 1894. The order directed that it be published once a week for at least eight weeks.

The affidavit of the publisher shows that it was published once a week for nine consecutive weeks, from January 13th, 1894, to March 17th, 1894. On May 4th, 1894, a default was entered against defendants at Sitka.

Section 3 of the act creating the District of Alaska provides that there should be two terms of Court each year, one at Sitka, commencing on the first Monday of May, and one at Wrangel, commencing on the first Monday of November.

Section 55 of the Oregon code provides that the summons published shall state "the time within which the defendant is required to appear and answer the complaint," and Section 56 provides that "the defendant shall appear and answer by the first day of the term following the expiration of the time (eight weeks), prescribed in the order for publication."

The law appointed the term of court, and the law provided that a defendant should have until the first day of the term next following the publication of the summons within which to appear and answer, and the law directed that the published summons should con-

tain such notice, and any other notice will be insufficient.

Hocklander vs. Hocklander, 73 Ill., 618.

Instead, however, of a summons requiring the defendants to appear by the first day of the next term of Court, commencing on the first Monday of May, 1894, the plaintiff published a summons which notified the defendants to appear, "within twenty days from the fifth day of March, 1894," thus shortening the time allowed by law, 40 days. According to this notice, the defendants must appear by March, 25th, 1894, and only seven days after the last day of publication.

When the first day of the term of Court has been fixed by statute, it is impossible that it can be changed to suit the convenience or caprice of the plaintiff. This notice, like the date of the order for publication, is by statute required to be stated in the summons, and unless so stated, the summons is void.

Odell vs. Campbell, 9 Or.

Choate vs. Spencer, 13 Montana 127.

Aetna Ins. Co. vs. Hallock, 6 Wallace, 556.

VII.

The affidavit for the order for pblication, does not

disclose the location of the office, or the post-office address of the defendant corporation, neither does it appear therefrom that any effort was made to ascertain the same.

This is an important inquiry, for the statute, (Sec. 56) provides, and the order of publication, directs that, copies of the summons and complaint shall be deposited in the post-office, and directed to the "defendant" at his place of residence. But the deputy marshal directed the papers to an officer of the corporation. This officer was not a defendant but the corporation was, and under this section the marshal has no discretion concerning the manner of service, but he must follow the statute and order, and direct the papers to the "defendant."

Scorpion Mining Co. vs. Morrisano, Nev... 375-384.

McFadden vs. Garret, 22 So Rep., 358.

The summons if sent to an officer of the corporation, might not reach the defendant. This officer was the president of the corporation, and in the nature of business affairs, such letter would—if received by the president (and even this does not appear) be delivered to the corporation—we think that is probable, but probability lacks that certainty required in matters of this nature. As said by the Supreme Court of Oregon, in Hadley vs. Heatherly, 4. Ore., 18.

"But courts will not intentionally take jurisdiction "of the person upon probabilities, and thus make up a "record that is to import absolute verity against the "person or property of a citizen when it is uncertain ""whether he has notice," and "it is a rule without "qualification or exception that when it is sought to "conclude a party by constructive service by publica- "tion, a strict compliance with the statute is required. "Nothing can be taken by intendment, and every fact "necessary to the exercise of jurisdiction based on this "mode of service must affirmatively appear in the mode "prescribed by the statute."

Gissel vs. Pulaski Co., 10 Fed. Rep. 893.

Gulpin vs. Page, 18 Wal., 366-7-8-9.

The Oregon cases announcing this doctrine, are,

Northcut vs. Lemery, 8 Ore., 316.

Odell vs. Campbell, 9 Ore., 309.

Sullivan vs. Settlemier, 97 U.S., 444.

VIII.

The decree of the District Court for the district of Alaska dismissing appellants bill should be reversed and said Court directed to enter the decree prayed for in said bill.

W. Scott Beebe,
Attorney for Appellants.